Supreme Court, U.S.
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No. 08-435

IN THE

Supreme Court of the United States

KEITH A. HALL,

Petitioner,

v.

LINDA WELLS BACK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly applied this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), in concluding (a) that Respondent adequately alleged a political affiliation dismissal in violation of the First and Fourteenth Amendments and (b) that Petitioner is not entitled to qualified immunity.

2. Whether the Sixth Circuit properly applied this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), in concluding that Respondent adequately alleged a political affiliation dismissal in violation of the First and Fourteenth Amendments.

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PRELIMINARY STATEMENT

The firing of Respondent Linda Wells Back ("Back") from her civil-service position of Internal Policy Analyst III with the Kentucky Office of Homeland Security ("OHS"), a state administrative agency, by respondent Keith Hall ("Hall"), erstwhile Executive Director of the OHS, forms the basis for this action. Against a backdrop of public acknowledgment of scandal in the administration of former Kentucky Governor Ernie Fletcher -- "the evidence strongly indicates wrongdoing by his administration with regard to personnel actions within the merit system,"[1] Back's section 1983 complaint alleges that Hall fired her because of her political affiliation as a Democrat in violation of the First Amendment and the Fourteenth Amendment. The twofold issue is whether Back's complaint sufficiently alleges a political affiliation dismissal and whether Hall, in such a situation, is entitled to qualified immunity.

In December 2003, the Kentucky governor's office changed from a Democratic administration to a Republican one. Hall, a Republican, was appointed as the Executive Director of the OHS in November 2004. Approximately two months later, on January 19, 2005, Back was fired. Back filed her complaint on January 17, 2006. Hall moved to dismiss her complaint, and the district court granted the motion

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[1] Ian Urbina, *Kentucky Governor Signs Agreement Citing Wrongdoing in a Hiring Scandal*, N.Y. Times (Aug. 25, 2006), *available at http://www.nytimes.com/2006/08/25/us/25kentucky.html*.

in part and denied it in part, so that Back's section 1983 claim of political affiliation dismissal against Hall in his individual capacity survived. Hall also filed a motion for qualified immunity, which the district court denied. On interlocutory appeal, the Sixth Circuit affirmed that denial, concluding that Back raised sufficient political affiliation allegations and Hall was not entitled to qualified immunity.

The petition for writ of certiorari should be denied in its entirety. The Sixth Circuit's opinion is entirely faithful to this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). In *Crawford-El*, this Court refused to impose a heightened pleading requirement. Hall's dissatisfaction with that refusal does not constitute a reason to grant certiorari.

Moreover, the Sixth Circuit's opinion does not conflict with this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which held that a complaint must "state a claim to relief that is plausible on its face," *id.* at 1974; *see also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

Most importantly, this case is a poor vehicle for certiorari review because Back adequately pled her political affiliation dismissal claim under either a heightened pleading standard or a notice pleading standard. Further, the decision below neither conflicts with prior precedents of this Court nor presents a matter of pressing public importance requiring this Court's intervention. Accordingly, certiorari should be denied.

STATEMENT

A. Background

On February 16, 2003, Back worked for the OHS as a grants and contracts administrator, a classified (or merit system) position protected under Ky. Rev. Stat. Ann. Ch. 18A, the Kentucky civil service statute. (Pet. App. 18; Compl. ¶ 10). Back successfully completed her probationary period, receiving excellent evaluations from her supervisor. (*Id.* ¶ 11). During the transitional time following the 2003 gubernatorial election, with the exit of the Democratic administration and the entrance of the Republican one, Back was the only merit system employee who remained; all other OHS employees were non-merit appointees and resigned upon the change in gubernatorial administration. (*Id.* ¶¶ 12, 14).

In March 2004, Erwin Roberts, an appointee of Governor Ernie Fletcher, replaced Back's supervisor, Col. Ray A. Nelson, as Executive Director of OHS. (*Id.* ¶ 13). On May 24, 2004, OHS became the state administrative agency responsible for meting out Homeland Security federal grants under an executive order of Governor Fletcher. (Pet. App. 19; Compl. ¶ 16). Back's responsibilities included processing federal grant applications and funding for the office as well as other administrative duties. (*Id.* ¶ 17). As the Republican administration hired new personnel, Back trained them. (*Id.* ¶ 19).

During the spring of 2004, Executive Director Roberts asked Back to set up the competitive grant application process. (Pet. App. 20; Compl. ¶ 22). As

requested, Back recommended a list of qualified persons to serve on the committee to review grant applications for federal Homeland Security grants to local governments. (*Id.*) However, Joel Schrader, the deputy director of OHS under the Republican administration, demanded the removal of persons on the list based on their political affiliation as Democrats. (*Id.*). Back served as staff to the review committee, which evaluated approximately 224 grant applications and made recommendations without regard to political affiliation based on objective scoring criteria that were publicly shared with all applicants at the beginning of the application process. (*Id.* ¶ 23). Officials in the Office of the Governor rejected a number of the grants recommended by the review committee based on partisan grounds, and awarded grants to proposals with lower scores over higher scoring proposals based on the political affiliation of the applicants. (Pet. App. 21; Compl. ¶ 24). In response, Back voiced her concerns about the use of political affiliation in the awarding of federal Homeland Security grants. (Pet. App. 22; Compl. ¶ 26).

During the summer of 2004, Executive Director Roberts asked Back to help develop questionnaires and rating sheets to evaluate potential employees based on their knowledge and experience in the area of federal grant administration. (*Id.*; Compl. ¶ 27). During that same summer, prospective employees were asked about their political affiliation, (*id.* ¶ 28), and when Back voiced her concern about this, she was largely excluded from the interviewing process. (*Id.*).

Executive Director Roberts spoke to Back about upgrading her position during the spring and summer of 2004 to reflect her expanded responsibilities. (*Id.* ¶ 29). Back expressed concern about accepting a non-merit position. (*Id.*). Roberts suggested a civil service position as a branch manager but then changed his mind because the position required direct involvement with Schrader, who repeatedly invoked political considerations in the process of awarding grants and hiring personnel. (Pet. App. 28; Compl. ¶ 30). "Trust me," Roberts told Back. "You don't want it." (*Id.*). Roberts appointed Back to the position of Internal Policy Analyst III, effective September 1, 2004, also a classified position under Ky. Rev. Stat. Ann. Ch. 18A. (*Id.* ¶ 31).

In October of 2004, Roberts resigned, and in November 2004, Hall, a former lobbyist, became Executive Director of OHS. (*Id.* ¶¶ 32-33). On Wednesday, January 19, 2005, Hall and Schrader called Back into a 4 p.m. meeting, advised her that she was being terminated, and told her to clean out her desk and return her identification badge and parking pass. (Pet. App. 24; Compl. ¶ 36).

B. Decisions Below

On January 17, 2006, Back filed this lawsuit in the Eastern District of Kentucky against Hall, Schrader, Alecia Webb-Edgington (Kentucky's Director of Homeland Security), and the Commonwealth of Kentucky. (Pet. App. 15, Compl. ¶ 1). Back alleged that Hall violated her First Amendment and state-law rights by firing her because of her political affiliation as a Democrat and in retaliation for her

complaints about Schrader's use of "partisan political considerations." (Pet. App. 25, Compl. ¶ 37). Since this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), patronage dismissals have been recognized as unconstitutional under the First and Fourteenth Amendments because they "severely restrict political belief and association." *Id.* at 372-73; *see also Caudill v. Hollan*, 431 F.3d 900, 908 (6th Cir. 2005). To state a claim, a plaintiff needs to allege that she was discharged because of her political affiliation. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). This Court articulated an exception for those policymaking or advisory positions where the governmental authority can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the office involved." *Id.* at 518; *see also Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 663 (3d Cir. 2002).

The district court dismissed Back's suit against the Commonwealth, Webb-Edgington, and Hall and Schrader in their official capacities based upon sovereign immunity. *Back v. Hall*, No. 06-05, 2006 WL 2844144, at *1-2 (E.D. Ky. Sept. 29, 2006). The court dismissed Back's state-law claims due to her failure to exhaust her administrative remedies. *Id.* at *3. However, the district court held that Hall and Schrader were not entitled to qualified immunity and that Back's section 1983 First Amendment claims could proceed against them in their individual capacities. *Id.* at *2-3.

Hall filed a motion to reconsider his entitlement to qualified immunity, and Schrader filed a motion

for judgment on the pleadings based on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), after the judge who was initially assigned the case recused herself. *Back v. Hall*, 537 F.3d 552, 555 (6th Cir. 2008). The district court, relying on *Garcetti*, dismissed Back's freedom-of-speech claims, holding her speech unprotected as a matter of law because all of her statements were made pursuant to the duties of her position at OHS. *Back v. Hall*, No. 3:06-5-JMH, 2007 WL 1974187, at *2 (E.D. Ky. July 3, 2007). However, the district court denied Hall and Schrader's requests for qualified immunity on Back's patronage dismissal claims. *Id.* at *3-4.

The court began by stating that "[i]t is unconstitutional for a public employer to make personnel decisions based on political beliefs, unless 'the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Id.* at *3 (quoting *Branti v. Finkel*, 445 U.S. 507, 519 (1980)). The court noted that this *Branti* exception to the First Amendment protection against patronage dismissals "presumptively . . . encompass[es] positions placed by the legislature outside of the 'merit' civil service." *Id.* (quoting *McCloud v. Testa*, 97 F.3d 1536, 1542 (6th Cir. 1996)). Rejecting Hall's argument that although Back's Internal Policy Analyst position was a non-political merit position, her civil service protection was not intact because she was still in a probationary period, the court decided that Kentucky law does not allow employees -- even probationary merit system employees -- to be subjected to political affiliation discrimination. *Id.* at *4. Moreover, the court

reasoned, the *Rice* canon provides for deference to the judgment of a state legislature's determination of the essential nature of a job, and since the state legislature classified Back's positions as merit system positions, it clearly considered them non-political. *Id.*; *see also Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133, 1143 (6th Cir. 1994)). The district court concluded that Hall was not entitled to qualified immunity because Back had adequately alleged that her constitutional right was violated when she was terminated because she was a Democrat; that the violation involved her clearly established constitutional right to freedom of association; and that she had offered sufficient evidence to indicate that what Hall allegedly did was objectively unreasonable in light of her clearly established constitutional right. *Back*, 2007 WL 1974187, at *4.

Hall and Schrader sought interlocutory review in the court of appeals of the district court's political affiliation decision, which rejected their qualified immunity defense, but the Sixth Circuit affirmed. *Back v. Hall*, 537 F.3d 552, 554 (6th Cir. 2008). It set out the standard of review by stating that "[j]ust as we gauge other pleading-stage dismissals to determine only whether the complaint states a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6), so we review an assertion of qualified immunity to determine only whether the complaint adequately alleges the commission of acts that violated clearly established law." *Id.* at 555-56 (citation and internal quotation marks omitted). The court recited the Federal Rules of Civil Procedure's requirement that pleadings must set forth "a short and

plain statement showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a), and noted that "nothing about the defense of qualified immunity alters this modest pleading requirement." *Back*, 537 F.3d at 556 (citing *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002)).

The Sixth Circuit held that, "[m]easured by this yardstick, Back's political affiliation allegations suffice, and neither Hall nor Schrader is entitled to qualified immunity at this early stage of the case." *Id.* Under *Saucier*, the court evaluated whether "any constitutional right was violated and whether that right was clearly established." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)). It found that Back's allegations that she was a civil-service employee and that she was fired because of her political affiliation as a Democrat adequately pled a clearly established constitutional violation. *Id.*

After briefly discussing the *Branti* exception to the First Amendment right of "current and aspiring public employees" to be free from hiring and firing practices based on political affiliation, the court examined whether Back's former position was entitled to First Amendment protection because it involved no exercise of "discretion of political significance." *Id.* at 556-57 (citing *McCloud*, 97 F.3d at 1559). It concluded that Back's position fell "within the category of offices for which political affiliation is irrelevant." *Id.* at 556. The court reasoned that Kentucky's civil-service statute made Back's position classified, and Hall and Schrader had given it no reason to second guess the state legislature's deter-

mination that her position should be treated as non-political. *Id.* (citing *Rice*, 14 F.3d at 1143).

Secondly, the court determined that as of the date of Back's termination, Sixth Circuit precedent had established that administrative employees like Back who perform tasks that involve no discretion of political significance are entitled to First Amendment protection. *Id.* at 557. It rejected the attempts of Hall and Schrader to require that a published decision exist holding that political compatibility is not an appropriate requirement for her position, noting that prior precedent established that no separate patronage dismissal decision need exist "involving a particular position before qualified immunity can be denied." *Id.* (quoting *McCloud*, 97 F.3d at 1556). The probationary status argument did not succeed before the Sixth Circuit either: it held, "[i]t may well be that a probationary employee, like an at-will employee, may be fired for no reason or most any reason; she just cannot be fired for an unconstitutional reason." *Id.* at 558 (citation and internal quotation marks omitted).

Finally, Hall and Schrader argued that Back failed to establish a prima facie case of political affiliation dismissal. Rejecting their argument, the Sixth Circuit stated that "[b]ecause we are at the pleading stage of this case, and because there is no 'heightened pleading requirement . . . for civil rights plaintiffs in cases in which the defendant raises the affirmative defense of qualified immunity,' *Goad*, 297 F.3d at 503; *see also Crawford-El v. Britton*, 523 U.S. 574 (1998), Back was not required to plead her prima

facie case, *cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)." *Back*, 537 F.3d at 558. Rather, "[i]t sufficed to allege that she was fired because of her political affiliation in violation of the First Amendment." *Id.*

To Hall's and Schrader's protestations that Back's allegations were conclusory, deserving dismissal, the Sixth Circuit replied, "as the Supreme Court has recently made clear, the conclusory nature of particular allegations cannot alone justify dismissing a complaint. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). . . . [F]or now, at the pleading stage, it suffices that Back alleged that she was terminated by defendants Hall and Schrader by reason of her political affiliation as a Democrat." *Back*, 537 F.3d at 558 (internal quotation marks omitted). Hall's petition for writ of certiorari followed.

REASONS FOR DENYING THE PETITION

The decision below presents no occasion for certiorari review. First, Hall asserts that confusion exists with respect to the standard courts should apply to specificity of pleading when a qualified immunity defense is asserted. He contends that no applicable standard exists because in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Court held there is no "heightened pleading standard" but did not reach what test actually applies when a qualified immunity defense is raised "because instructing the District Courts to firmly apply the Federal Rules of Civil Procedure is no test at all." (Pet. 11). He asserts that some tension exists between the Supreme Court's articulation in *Bell Atlantic Corp. v. Twombly*, 127 S.

Ct. 1955, 1974 (2007), that a complaint must be sufficient "to state a claim to relief that is plausible on its face," and the notice pleading requirement contained in Fed. R. Civ. P. 8(a)(2) that a complaint need only give "a short and plain statement of the claim showing that the pleader is entitled to relief." (Pet. 12). He argues that the rejection of the heightened pleading standard in *Crawford-El* and the "order of battle" rule in *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001),[1] complicate matters further, leaving district courts adrift as to what standard applies in section 1983 claims where a qualified immunity defense is asserted. (Pet. 17). While Hall's rhetoric is colorful, certiorari is not warranted. Hall's personal view that "[q]ualified immunity has been emasculated by *Crawford-El*," (Pet. 26), and his repudiation of this Court's precedents, which have been readily accepted and applied by the courts of appeals, are not grounds for certiorari review.

Even if the pleading standard were unsettled, this case remains a poor vehicle for certiorari review because Back has adequately pled her section 1983 political affiliation claim under either a notice pleading

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[1] The "order of battle" rule requires courts considering whether a government official is entitled to qualified immunity to determine (1) whether the facts alleged, taken in the light most favorable to the nonmovant, demonstrate the violation of a constitutional right, and (2) if so, then it must be determined whether the contours of the right were clearly established such that a reasonable person would understand that his actions violated that right. *Saucier*, 533 U.S. at 200-02.

standard or a heightened pleading standard. Although Hall portrays Back's complaint as conclusory and lacking substance, this is simply not so. Moreover, the decision below neither conflicts with any prior decision of this Court nor involves any matter of pressing public importance requiring this Court's intervention. Accordingly, the Court should deny certiorari.

A. This Court's Precedents Make Clear that No Heightened Pleading Standard Is Required in Section 1983 Cases Involving the Assertion of a Qualified Immunity Defense.

In an effort to revive his qualified immunity defense, Hall attacks Back's complaint as well as settled precedents governing the relevant pleading standard and qualified immunity analysis. He describes the law in this area as confused, "emasculated," and filled with tension. (Pet. 16-17, 26). As noted, both lower courts resolved the qualified immunity question in Back's favor with little difficulty. This result is manifestly correct, and there is no warrant for further review by this Court.

1. *Twombly:* Rejection of a "Gloss" on an Accepted Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure sets out the familiar and forgiving standard of notice pleading: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Traditionally, district courts were not to dismiss a complaint "for failure to state a claim

unless it appear[ed] beyond doubt that the plaintiff c[ould] prove *no set of facts* in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis supplied). In *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007), this Court discussed the *Conley* "no set of facts" gloss in some detail. Noting that too literal a reading of the "no set of facts" gloss might prevent a court from dismissing even a "wholly conclusory statement of claim" where the pleadings left open even a "possibility" that a plaintiff might later establish some "set of facts," this Court recounted the disinclination of a "good many judges and commentators" to take the phrase literally. *Id.* at 1968-69 (citing cases and articles). In *Twombly*, this Court "retire[d]" the *Conley* "no set of facts" phrase, describing it as "best forgotten as an incomplete, negative gloss on an *accepted pleading standard*: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969 (emphasis supplied). Abandonment of the gloss did not mean abandonment of the settled and accepted notice pleading standard.

This Court broke no new ground describing the standard, beginning by reciting the familiar Rule 8(a)(2) language. It continued,

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclu-

> sions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .

Id. at 1964-65 (citations omitted).

In the context of section 1 of the Sherman Act, this Court held that

> stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."

Id. at 1965 (footnotes omitted) (quoting 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004)). This Court noted that Rule 8(a)(2)'s notice pleading requirement *did* eliminate the requirement that a claimant "set out *in detail* the facts upon which he bases his claim," but that the Rule "still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n.3 (citations omitted). However, this Court emphasized that it was *not* requiring a "heightened fact pleading

of specifics"; rather, a complaint need only contain "enough facts to state a claim to relief that is *plausible* on its face" rather than merely "conceivable." *Id.* at 1974. Applying this standard to the case before it, this Court held that "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.*

A few weeks later, this Court decided *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), demonstrating that no change in the standard had taken place. In *Erickson*, the Court vacated the Tenth Circuit's judgment affirming the district court's dismissal of a prisoner's section 1983 suit against prison medical officials, which alleged deliberate indifference to his serious medical needs based on prison officials' removing him from a treatment program for his liver condition resulting from hepatitis C. *Id.* at 2198. Rejecting the Tenth Circuit's conclusion that the allegations in question warranted dismissal because they were too conclusory, this Court emphasized that Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only notice pleading -- "a short and plain statement of the claim showing that the pleader is entitled to relief." 127 S. Ct. at 2200. Citing *Twombly*, the Court continued, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Id.* (citing *Twombly*, 127 S. Ct. at 1955). In addition, the Court emphasized, "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id.*

The Supreme Court has thus made abundantly clear that *Twombly* continues to embrace the notice pleading standard. What *Twombly* rejected was the *Conley* "gloss" on the "accepted" notice pleading standard; it rejected the notion that no complaint should be dismissed "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." 127 S. Ct. at 1969-70. In other words, a court should not struggle to dream up some *conceivable* set of facts which would animate an otherwise insufficient complaint. Instead, the complaint should do its own work. It should give notice to a defendant of plaintiff's claim. It need not provide detailed allegations and inferences may be drawn, but it should not require the reader to work hard at imagining a set of facts that would entitle plaintiff to relief. This is not at all the same as requiring a heightened pleading standard, mandating a plaintiff to set out in detail the facts undergirding his cause of action. *See, e.g., Aktieselskabet Af 21. Nov. 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) ("We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact."); *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103-04 (9th Cir. 2008); *Phillips v. County of Allegheny*, 515 F.3d 224, 233, 235 (3d Cir. 2008) ("under our reading, the notice pleading standard of Rule 8(a)(2) remains intact"); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 841-42 (9th Cir. 2007); *Watts v. Florida Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007). No wholesale rejection of a settled standard is in play here.

2. *Crawford-El*: Rejection of a Heightened Pleading Standard

The presence of a qualified immunity defense changes nothing. Other precedents of this Court have indisputably rejected a heightened pleading standard in section 1983 and other contexts. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (holding that a plaintiff's complaint in a Title VII case need not contain specific facts sufficient to establish a prima facie case under *McDonnell Douglas*); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (holding that a prisoner bringing a section 1983 action against a government official need not present clear and convincing evidence of the official's improper motive in order to defeat the official's motion for summary judgment); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (rejecting a heightened pleading requirement for section 1983 claims alleging municipal liability). Although Hall vigorously attacks *Crawford-El*, circuits across the land have followed this precedent for a decade with little fanfare. Hall's personal preference for the dissenting view rather than the majority's view in *Crawford-El* does not constitute grounds for certiorari.

What was true a decade ago in *Crawford-El* remains true now: "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing" a heightened pleading standard on a plaintiff. 523 U.S. at 594. Then, as now, existing procedures established by the Federal Rules of Civil Procedure

remain available to federal district judges handling such claims. *Crawford-El*, 523 U.S. at 598. Qualified immunity defense or not, it is "impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman*, 507 U.S. at 168. Rule 9(b) does address the need for greater particularity in pleading certain claims, but section 1983 is not among them. *Id.* As this Court reasoned in *Leatherman*, *expressio unius est exclusion alterius*: the mention of one thing is the exclusion of another. *Id.*; *see also Swierkiewicz*, 534 U.S. at 513 ("Just as Rule 9(b) makes no mention of municipal liability under [section 1983], neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a)."). The presence of a qualified immunity defense in a case provides no grounds for rejecting the accepted notice pleading standard set in place by the Federal Rules of Civil Procedure.[3]

Some lower courts have labored to apply *Twombly* to the qualified immunity context and, in the end, have reached the same conclusion: although this Court rejected the *Conley* gloss on the accepted standard, courts may not apply a heightened pleading standard in the context of a qualified immunity defense. For example, in *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), the Tenth Circuit described *Twombly* as "announcing a new (or clarified)

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[3] *But see Danley v. Allen*, 540 F.3d 1298, 1313 (11th Cir. 2008).

standard," which it acknowledged was "less than pellucid" and as resting somewhere between "heightened fact pleading, *which is expressly rejected*," and allowing conclusory complaints based on "a formulaic recitation of the elements of a cause of action," which will not do. *Id.* at 1247 (emphasis supplied). The Tenth Circuit was careful to note that *Twombly* "reiterates the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven." *Id.* Thus, reasoned the Tenth Circuit, "'plausible' cannot mean 'likely to be true.'" *Id.* In the context of a qualified immunity defense asserted by state officials, the Tenth Circuit held that "plaintiffs must allege facts sufficient to show (assuming they are true) that the defendants plausibly violated their constitutional rights, and that those rights were clearly established at the time. This requires enough allegations to give the defendants notice of the theory under which their claim is made." *Id.* at 1249. Noting that both *Crawford-El* and *Twombly* rejected a heightened pleading standard, the court concluded that complaints in cases subject to qualified immunity defenses need not include "all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law." *Id.* Instead, a complaint must make clear the "grounds" on which plaintiff is entitled to relief, *id.* (quoting *Twombly*, 127 S. Ct. at 1965 n.3), thus satisfying the requirements of notice pleading.

In *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 2931 (June 16, 2008) (Nos.

07-1015, 07-1150, 07-827), the Second Circuit discussed the pleading standard "to overcome a qualified immunity defense," analyzing *Leatherman*, *Swierkiewicz*, and *Crawford-El*, and noted that after *Swierkiewicz*, "[m]ost Circuits appear to have rejected a heightened pleading standard." *Iqbal*, 490 F.3d at 153-55.[4] Turning to *Twombly*, the Second Circuit noted that the decision "explicitly disclaims that it was 'requir[ing] heightened fact pleading of specifics,' and emphasized the continued viability of *Swierkiewicz*, which had rejected a heightened pleading standard." *Id.* at 156. The Second Circuit also pointed out that "just two weeks after issuing its opinion in [*Twombly*], the Court cited it for the traditional proposition that '[s]pecific facts are not necessary [for a pleading that satisfied Rule 8(a)(1)]'; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 157 (quoting *Erickson*, 127 S. Ct. at 2200).

The Second Circuit concluded, "[a]fter careful consideration," that "the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,'

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[4] Some of these pre-*Twombly* cases included *Moya v. Schollenbarger*, 465 F.3d 444, 454-55 (10th Cir. 2006); *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1055-56 (9th Cir. 2005); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66-67 (1st Cir. 2004); *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002).

which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 157-58. Despite the fact that *Swierkiewicz* was a Title VII decision, the Second Circuit remained "mindful of the Supreme Court's statement in that decision that heightened pleading requirements 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 158 (quoting *Swierkiewicz*, 534 U.S. at 515). Accordingly, "[a]bsent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in [*Twombly*], reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed." *Id.*

In sum, in the context of section 1983 and elsewhere, *Twombly* stands in accord with *Crawford-El*, *Swierkiewicz*, and *Leatherman*, rejecting a heightened pleading standard and, instead, embracing the original articulation of notice pleading contemplated by the Federal Rules of Civil Procedure. The *Conley* gloss swung to an extreme which has now been eradicated, leaving in place the settled precedent that applies in all contexts save those enumerated in Fed. R. Civ. P. 9(b). Inasmuch as the lower courts are arriving at the same conclusion in the qualified immunity context, aided by this Court's guidance in *Erickson*, certiorari is not warranted.

B. This Case Is a Poor Vehicle for Certiorari Review Because Back Adequately Pled Her Political Affiliation Dismissal Claim Under Either a Notice Pleading or a Heightened Pleading Standard.

This case is a poor vehicle for certiorari review because the allegations in Back's complaint present sufficient detail to satisfy either a notice pleading or a heightened pleading standard.

In the context of qualified immunity, the initial inquiry is whether, taken in the light most favorable to the party asserting the injury, "the facts alleged show the [government official's] conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If so, the next inquiry is whether the constitutional right at issue was clearly established. *Id.* This "*Saucier* two-step" or "order of battle" test has been steadily applied across the circuits. *See, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007); *Hubbard v. Taylor*, 538 F.3d 229, 238 (3d Cir. 2008); *Jennings v. Jones*, 499 F.3d 2, 10 (1st Cir. 2007); *Caudill v. Hollan*, 431 F.3d 900, 910, 913 (6th Cir. 2005).[6]

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[6] This Court requested briefing on and is currently considering the question whether *Saucier* should be overruled in the Fourth Amendment setting. *See Pearson v. Callahan*, 128 S. Ct. 1702 (2008). Even the petitioners in that case argue that "the Court should only resolve the 'order of battle' for Fourth Amendment claims." Pet.'s Brief, *Pearson v. Callahan*, No. 07-751, 2008 WL 2367229, at *56 (June 6, 2008). The settled

With respect to whether the facts alleged in Back's complaint show the violation of a constitutional right, the answer is unequivocally yes. Since 1976, patronage dismissals have been recognized as unconstitutional under the First and Fourteenth Amendments because they "severely restrict political belief and association." *Elrod v. Burns*, 427 U.S. 347, 372 (1976); *see also Caudill*, 431 F.3d at 908. To state a claim, a plaintiff must allege that she was discharged due to her political affiliation. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). This Court articulated an exception for those policymaking or advisory positions where the government official can show that "party affiliation is an appropriate requirement for the effective performance of the office involved." *Id.* at 518; *see also Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 663 (3d Cir. 2002).

Reading the allegations contained in Back's complaint as a whole, *e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112 (1979); *Black v. Lane*, 22 F.3d 1395, 1400 (7th Cir. 1994); *Garita Hotel Ltd. P'ship Etc. v. Ponce Fed. Bank*, 958 F.2d 15, 17-18 (1st Cir. 1992), she states a claim of patronage dismissal under any standard. She has carefully sketched a background of detailed facts supporting her claim (in even more detail than summarized here), describing her hiring on February 16, 2003 as a classified (or merit system) employee protected under the Kentucky civil service statute (Pet. App. 18;

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standard to be applied to this case is thus not under review and remains undisturbed.

Compl. ¶¶ 10-11); the transitional time following the November 2003 gubernatorial election while Back was the only merit system employee who remained as the administration changed from Democratic to Republican (*Id.* ¶¶ 12-14); the replacement in March 2004 of Col. Nelson with her supervisor, Erwin Roberts, and the responsibilities she took on of processing federal grant applications and funding (Pet. App. 18-19; Compl. ¶¶ 13, 16), of setting up the competitive grant application process, and of serving as staff to the review committee which evaluated grant applications (Pet. App. 20; Compl. ¶¶ 22-23); that she never held any policy-making position or job duties within OHS (Pet. App. 19; Compl. ¶ 15); the rejection by officials in the Office of the Governor of a number of grants recommended by the review committee on partisan grounds and based on political affiliation of the applicants (Pet. App. 21; Compl. ¶ 24); Back's voicing of her concern about the use of political affiliation in the awarding of federal Homeland Security Grants (Pet. App. 22; Compl. ¶ 26); Back's helping develop questionnaires and rating sheets to evaluate potential employees based on their knowledge and experience in federal grant administration, and that when Back voiced her concern about the fact that prospective employees were asked about their political affiliation, she was largely excluded from the interviewing process (*id.* ¶¶ 27-28); the concern expressed by Roberts regarding the branch manager civil service position he was going to offer to Back and his comment, later, of "Trust me, you don't want it" because it required direct involvement with Schrader, who repeatedly invoked political consid-

erations in awarding grants and hiring personnel (Pet. App. 22-23; Compl. ¶29-30); the appointment on September 1, 2004 of Back to the position of Internal Policy Analyst III, also a classified position (Pet. App. 23; Compl. ¶ 31); Roberts' resignation in October 2004 and Hall's appointment as Executive Director of OHS in November 2004 (*id.* ¶¶ 32-33); and Back's termination on January 19, 2005 (Pet. App. 24, Compl. ¶ 36), because of her political affiliation as a Democrat in violation of the First and Fourteenth Amendments of the Constitution (Pet. App. 25; Compl. ¶¶ 37, 39).

These facts are set out in greater detail than is usual in a case where, as here, discovery has yet to take place. There is easily enough to clear the notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure and the *Twombly* plausibility standard, 127 S. Ct. at 1974 (a complaint must be sufficient "to state a claim to relief that is plausible on its face"). There is no need to refer to the now-defunct *Conley* "no set of facts" gloss -- Back has clearly set out the facts, assumed as true and with all inferences drawn in her favor, illustrating, *inter alia*, the anti-Democratic animus of the new Republican administration, recounting even her prior supervisor's concern that she not take certain civil service positions due to that animus, and the tight temporal period between the hiring of Hall and her termination. The set of facts alleged by Back more than adequately supports her patronage dismissal claim. *Twombly*, 127 S. Ct. at 1965, 1974; *Erickson*, 127 S. Ct. at 2200; *see also Swierkiewicz*, 534 U.S. at 510-11 (holding that Title VII complaint need not contain specific

facts sufficient to establish a prima facie case); *Robbins*, 519 F.3d at 1249 (concluding complaints in cases subject to qualified immunity defenses need not include "all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law" but must make clear the "grounds" on which plaintiff is entitled to relief).

Certainly, as far as qualified immunity is concerned, Back satisfies the first inquiry: whether, taken in the light most favorable to the party asserting the injury, "the facts alleged show the [government official's] conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. It is well settled that a patronage dismissal claim constitutes a violation of the First and Fourteenth Amendments of the Constitution. *Elrod v. Burns*, 427 U.S. at 372; *Caudill v. Hollan*, 431 F.3d 900, 908 (6th Cir. 2005).

The second qualified immunity inquiry under *Saucier* is whether the right is clearly established. 533 U.S. at 201. In the context of a patronage dismissal case, the inquiry usually focuses on the position at issue -- i.e., whether the position falls within the *Elrod-Branti* policymaker exception. *McCloud*, 97 F.3d at 1543. In general, this is a question of law for the court; however "the legal determination cannot be made without some preliminary factual inquiry." *Almonte v. City of Long Beach*, 478 F.3d 100, 110 (2d Cir. 2007). Accordingly, "qualified immunity may only be granted on a motion to dismiss if 'the available record adequately supports the defendants' claim that it was objectively reasonable for them to believe that' party affiliation was an appropriate re-

quirement for the effective performance of the plaintiff's official duties." *Id.* (quoting *McEvoy v. Spencer*, 124 F.3d 92, 105 (2d Cir. 1997)). Otherwise, "the issue may be resolved at the pleading stage only where the complaint, or the relevant state or municipal provisions, provide sufficient facts about the plaintiff's job responsibilities." *Almonte*, 478 F.3d at 110; *see also Pleva v. Norquist*, 195 F.3d 905, 912 (7th Cir. 1999) (holding that although "[t]he question of whether a position is exempted from the First Amendment patronage dismissal ban is a factual one that should ordinarily be left for a jury to determine . . . in some cases, the duties and responsibilities of a particular position are clearly outlined by law," at which point "the court may make the determination, as a matter of law.").

To begin with, although Hall's petition finds fault with the Sixth Circuit's decision and *Crawford-El* in many ways, nowhere does it challenge the Sixth's Circuit's clear and considered holding that "Back's former position falls within the category of offices for which political affiliation is irrelevant." 537 F.3d at 556-58. Hall thus waived any argument that Back's position falls within the *Elrod-Branti* exception to the First Amendment protection against patronage dismissals.

Even leaving aside the issue of waiver, Back's complaint, well pled under a notice pleading or heightened pleading standard, alleged that she was a civil service employee and provided a detailed description of her various duties. (Pet. App. 18, 23; Compl. ¶¶ 10, 31). The Kentucky legislature classi-

fied her positions under the Kentucky civil service statute, and Kentucky law states that "[n]o person shall be appointed or promoted to, or demoted or dismissed from' such classified positions based on 'political . . . affiliations." Ky. Rev. Stat. Ann. §§ 18A.115, 18A.140(1); *see also id.* § 18A.111(1) (allowing probationary employees to appeal as provided in § 18A.095 (which allows administrative appeals based on discrimination)). Hall's petition provides no reason to abandon settled Sixth Circuit law that gives presumptive deference to a state legislature's determination that a position "should be classified as . . . nonpolitical." *Rice v. Ohio Dep't of Transp.*, 14 F.3d 1133, 1143 (6th Cir. 1994). Moreover, as the Sixth Circuit pointed out, at the time of Back's termination, "Sixth Circuit precedent established at the least that an administrative employee like Back, who 'simply perform[s] functions over which he or she has no discretion, or no discretion of political significance,' is entitled to First Amendment protection." *Back*, 537 F.3d at 557 (quoting *Caudill v. Hollan*, 431 F.3d 900, 909-10 (6th Cir. 2005); *McCloud v. Testa*, 97 F.3d 1536, 1559 (6th Cir. 1996)). Accordingly, the constitutional right at issue was clearly established with respect to Back's former position, and Hall's qualified immunity defense falls of its own weight.

Inasmuch as Back's complaint presents enough detail for this Court to decide at this early stage that Hall's qualified immunity defense fails as a matter of law, *see Almonte*, 478 F.3d at 110, it is patently evident that the allegations in Back's complaint contain sufficient detail to satisfy either a notice pleading or

a heightened pleading standard, rendering this case a poor vehicle for certiorari review.

Finally, the decision below does not conflict with prior precedents of this Court. Nor does it present a matter of pressing public importance requiring this Court's intervention. In sum, certiorari is not warranted.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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